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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In The Matter of)
)
Petition for Interim Waiver of) CC Docket No. 80-286
Section 36.2(a)(3) Filed by the) DA 98-909
National Exchange Carriers)
Association, Inc.)

REPLY COMMENTS OF
e.spire COMMUNICATIONS, INC.
TO NECA'S PETITION FOR WAIVER

e.spire Communications, Inc. ("e.spire" or "the Company"), by its attorneys, respectfully submits these reply comments, pursuant to the Commission's May 14, 1998 Public Notice in CC Docket No. 80-286, in opposition to the above-captioned Petition for Waiver of Section 36.2(a)(3) of the Commission's Rules ("Petition") filed by the National Exchange Carriers Association, Inc. ("NECA").

Introduction

e.spire is a facilities-based CLEC that has been rapidly deploying local fiber optic networks throughout the United States. The Company provides a broad array of advanced telecommunications services including data services, dedicated local services and local switched voice services to thousands of end users, including many Internet Service Providers ("ISPs"). Under e.spire's existing local interconnection agreements with most incumbent local exchange carriers ("ILECs"), e.spire is entitled to collect reciprocal compensation from ILECs for the transport and termination of local calls routed to it by such ILECs – including local access calls placed to ISPs. Commission approval of the NECA petition would provide affected ILECs a

pretext for avoiding this payment obligation by arguing that ISP access traffic has been reclassified from “local” to “interexchange.” Such an outcome would have a significant negative impact on e.spire’s revenues, and would significantly reduce competition in the local exchange market.

Consequently, e.spire concurs in the comments filed by the Association for Local Telecommunications Services (“ALTS”) in this proceeding and files these reply comments to underscore several of the important points made therein. The NECA Petition is a thinly-veiled attempt by the ILECs to misuse the jurisdictional separations process to avoid liability for reciprocal compensation under existing local interconnection agreements, and e.spire strongly opposes approval of the request.

Discussion

NECA has petitioned the Commission for waiver of its Rule 36.2(a)(6), regarding ILEC allocations between the intrastate and interstate jurisdictions. Specifically, the Petition seeks to “freeze” prior allocations between the jurisdictions. NECA bases its request upon an alleged “distortion” in separations results being caused by growth in Internet traffic, which it claims is interstate in nature.¹

NECA obviously recognizes that existing jurisdictional separations procedures require carriers to classify local calls placed to ISPs as “local,” intrastate traffic – hence the petition for waiver. Nevertheless, NECA now asks the Commission to waive its Rules as required to allow ILECs unilaterally to reclassify such ISP traffic as “interexchange,” interstate traffic in their separations reports. In effect, NECA argues that despite the fact that ISP traffic moves locally

¹ NECA Petition at 1-4.

and is carried in accordance with local tariffs, the costs and expenses related to this traffic should be reported to the separate interstate jurisdiction.

However, as explained by ALTS, such a practice is flatly inconsistent with the fundamental rationale underlying the separations process – *i.e.*, service rates and related service costs and expenses must be linked by jurisdiction.² NECA implicitly recognizes the need to couple jurisdictional costs and cost recovery by claiming that a jurisdictional distortion has arisen that requires correction by reconnecting the ISP traffic and its associated costs. Yet, NECA asks the Commission to allow ILECs to do the exact opposite. NECA seeks authorization to allow carriers to shift some of the costs associated with entirely local ISP traffic to the interstate jurisdiction. In other words, NECA seeks to shift the burden of paying for costs associated with local ISP traffic from its local exchange service customers to the customers of interstate, interexchange services, who have neither caused such costs to be incurred or benefit from their expenditure. The principles of cost-causation cannot justify such a shift. Accordingly, the Commission should reject NECA's request to allow carriers to sever local ISP traffic from its associated costs and expenses and shift those costs into the interstate jurisdiction.

Like ALTS, e.spire also is concerned that NECA has chosen to bypass the Joint Board process traditionally utilized for resolving separations issues. The Joint Board functions through the cooperative efforts of state and federal regulators to administer the proper allocation of costs and assets between the intrastate and interstate jurisdictions. Administering the jurisdictional separations process requires an intricate balance between state and federal regulators. Within this system, it is not appropriate for one jurisdiction to unilaterally allow reallocation of costs between jurisdictions. NECA's attempt to avoid State commission input is understandable since

² ALTS Comments at 4 (citing Smith v. Illinois Bell, 282 U.S. 133 (1930)).

20 states and NARUC³ all have recently opined that ISP access traffic is – and should continue to be – classified as “local,” intrastate traffic. However, the FCC should not participate in this jurisdictional sleight of hand by granting the requested waiver.

As ALTS points out, NECA simply has made no showing in support of such extraordinary relief. Significantly, NECA’s Petition is virtually devoid of any data or statistics which verify their claims of a distortion caused by ISP traffic or quantify its impact on NECA members. Indeed, in what should be regarded as a disqualifying failure in the Petition, NECA did not even contend that the growth of ISP traffic has led to under-earning in the intrastate jurisdiction or that State regulators have refused to reformulate intrastate rates to account for alterations in local traffic patterns.

Worse yet, NECA’s request asks the Commission to “jump the gun” on this issue. Whether freezing current allocations should be undertaken to properly account for increased Internet traffic is an issue which is squarely and specifically raised in the Joint Board’s on-going Separations Reform NPRM.⁴ Since the Joint Board is seeking comment on this precise issue in the course of that proceeding, granting the Petition now clearly would be inappropriate.⁵ The Commission would undercut the commendable efforts of the Joint Board by prematurely granting NECA’s requested waiver.

³ See NARUC Resolution No. 7, Asserting State Authority Regarding ISP Reciprocal Compensation (adopted November 7, 1997) (stating that ISP traffic “should continue to be treated as subject to state jurisdiction . . .”).

⁴ In the Matter of Jurisdictional Separations Reform and Referral to the Federal-State Joint Board, Notice of Proposed Rulemaking, CC Docket No. 80-286, 12 FCC Rcd 22120 (rel. October 7, 1997), at ¶ 49.

⁵ NECA can hardly claim an inability to wait for the outcome of this proceeding, since no separations “crisis” exists and this traffic has been considered intrastate since as early as 1989. See note 6, infra.

In short, e.spire urges the Commission to see the NECA petition for what it is – just another back-door attempt to reverse long-standing Commission policy and precedent which classifies ISP access traffic as “local.” While e.spire does not oppose a Commission review of its policy, such a policy about-face would be highly inappropriate in a simple waiver proceeding. As the Commission is well aware, it has repeatedly – and recently – ruled that ISP traffic is properly classified as “local” traffic. Only last year the Commission stated, “ISPs may purchase services from incumbent LECs under the same intrastate tariffs available to end users. ISPs may pay business line rates . . . , rather than interstate access rates.”⁶ As importantly, the issue of whether this policy should be changed is the subject of separate FCC proceedings which are addressing the issue head on.⁷

Even the specific issue of whether ISP traffic is “local” for purposes of reciprocal compensation obligations is before the Commission in the context of the ALTS Request for Clarification.⁸ Accordingly, e.spire agrees with the many commenters who argue that the NECA petition is ill-supported and procedurally deficient – and should be summarily rejected. If the Commission decides to reconsider the jurisdictional classification of ISP access traffic, it should do so in the context of appropriate Joint Board and generic rulemaking proceedings.

⁶ In the Matter of Access Charge Reform , CC Docket No. 96-262, 12 FCC Rcd 15982, at ¶¶ 342 appeal pending, Southwestern Bell Telephone Co. v. FCC, Case No. 2618, United States Court of Appeals for the Eighth Circuit; see also, Amendment of Part 69 of the Commission’s Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, 4 FCC Rcd 3983 (1989) (“ESP traffic over local business lines is classified as local traffic for separations purposes”).

⁷ See Separations Reform NPRM; Usage of the Public Switched Network by Information Service and Internet Access Providers, CC Docket No. 96-263, Notice of Inquiry (released December 24, 1996).

⁸ Request by ALTS for Clarification of the Commission’s Rules Regarding Reciprocal Compensation for Information Service Provider Traffic, CCB/CPD 9-30 (filed June 20, 1997).


Conclusion

For the foregoing reasons, the Commission should deny NECA's petition for waiver of Commission Rule 36.2(a)(3).

Respectfully submitted,

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